

Decision **DRAFT DECISION OF ALJ YACKNIN** (Mailed 6/14/06)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Rulemaking to Update, Clarify and  
Recodify Rules of Practice and Procedure.

Rulemaking 06-02-011  
(Filed February 16, 2006)

**OPINION ADOPTING AMENDMENTS TO  
THE RULES OF PRACTICE AND PROCEDURE**

**I. Summary**

We adopt, with some changes and additions, our proposed amendments to the Commission's Rules of Practice and Procedure (Rules) as set forth in the appendix attached to this decision. With the adoption of these amendments, we update, clarify and simplify the Rules. The amendments (1) repeal rules that have been rendered obsolete by changes in statute or practice; (2) delete redundant rules, rules which define commonly understood terms and phrases, and rules which merely state the Commission's existing authority or reiterate statutory requirements; (3) edit rules to reflect and formalize standard Commission practices; and (4) simplify the language and organization of the rules. The amendments reorganize the rules in a more logical fashion reflective of the course of Commission proceedings, making it easier to identify and locate rules regarding particular subjects. Taken together, these changes shorten the bulk of the Rules of Practice and Procedure by nearly 40 percent.

## **II. Comments on Proposed Rules Amendments**

Following issuance of the OIR, the Chief Administrative Law Judge (ALJ) sent our Notice of Proposed Regulatory Action to the Office of Administrative Law which duly printed the notice in the California Regulatory Notice Register of March 17, 2006. The OIR was also sent to persons on a service list commonly used for such procedural purposes. Comments on the rules amendments as originally proposed in the OIR were received on or before May 1, 2006 from the Division of Ratepayer Advocates (DRA), San Diego Gas & Electric Company (SDG&E),<sup>1</sup> Pacific Gas and Electric Company (PG&E), The Utility Reform Network (TURN), AT&T California (AT&T), and Verizon California (Verizon).

## **III. Changes to Rules Amendments as Originally Proposed**

In response to the comments on the rules amendments as originally proposed in the OIR, and after further internal review, we make the following changes as reflected in the appendix to this decision:

### **A. Ethics**

Proposed Rule 1.1 deletes the phrase contained in the old Rule 1 which applies the rule to any person who enters an appearance at hearing. As Verizon points out in its comments, this deletion would unintentionally excuse parties who, although they do not file pleadings or offer testimony at a hearing, may

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<sup>1</sup> Although SDG&E filed its comments on April 25, 2006 under motion to accept them late-filed, the time for filing comments had been extended to May 1, 2006. (ALJ's Ruling Extending Time to Comment, April 18, 2006.) We accept SDG&E's comments as timely filed.

present argument at a hearing. We modify proposed Rule 1.1 to reinsert this phrase.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 1                | Rule 1.1         |

### **B. Service of Notice of Availability**

Proposed Rule 1.10 inadvertently deleted language providing for the electronic mail service of a Notice of Availability in lieu of the actual document. We modify proposed Rule 1.10 to reinsert this provision, and to make other non-substantive, clarifying edits.

| <b>Affected rule:</b> | <b>New rule:</b>            |
|-----------------------|-----------------------------|
| Rule 2.3.1(a)-(c)     | Rule 1.9(a)<br>Rule 1.10(a) |

### **C. Verification**

Consistent with the organization of the current rules, proposed Rule 1.11, regarding verification generally, includes as subsection (c) the requirement that applications, complaints, and answers be verified. We modify the proposed rules to remove this provision from its current location, and to replace it in the respective rules regarding the required contents of applications (Rule 2.1), complaints (Rule 4.2) and answers (Rule 4.4.)

| <b>Affected rule:</b> | <b>New rule:</b>                              |
|-----------------------|---|
| Rule 2.4              | Rule 1.11<br>Rule 2.1<br>Rule 4.2<br>Rule 4.4 |

**D. Response to Amended Filed Document**

Proposed Rule 1.12(b) omits the language in current Rule 2.6(a)(2) clarifying that, if a party has responded to a filed document that is subsequently amended, the party need not provide an additional response to the amended document. We modify proposed Rule 1.12(b) to reinsert this clarification.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 2.6(a)(2)        | Rule 1.12(b)     |

**E. Copies for Filing**

The proposed rules carry forward the current requirements regarding number of copies to be tendered for filing a document. Due to changes in internal Commission procedures, fewer copies are required. We modify the rules to reduce the number of copies required for filing.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 2.5              | Rule 1.13(b)     |
| Rule 2.4              | Rule 4.2(b)      |
| Rule 7.1(a)           | Rule 8.3(a)      |
| Rule 85               | Rule 16.1(a)     |

**F. Daily Calendar Notice of Recommended Decisions**

Pursuant to current Commission practice and current Rule 8.2(a), only those recommended decisions that are issued after evidentiary hearing are noticed in the Daily Calendar. Proposed Rule 1.17 would provide for notice in the Daily Calendar of the issuance of all recommended decisions. This proposal is unduly burdensome for Commission administration with respect to

recommended decisions that are not subject to public comment and review and, therefore, not filed. We therefore modify the proposed rule to limit Daily

Calendar notice to recommended decisions that are subject to public review and comment (and thus filed).

| Affected rule: | New rule: |
|----------------|-----------|
| Rule 3.4       | Rule 1.16 |

### **G. CEQA Compliance**

Proposed Rule 2.4 inadvertently deleted language specifically adopting the procedures set forth in the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 *et seq.*) and the CEQA Guidelines (Administrative Code § 15000 *et seq.*). We change proposed Rule 2.4 to include this provision. We also change proposed Rule 2.4 to require applications for authority to undertake projects that are categorically exempt from CEQA to so state with citation to the relevant authority.

| Affected rule:         | New rule: |
|------------------------|-----------|
| Rule 17.1<br>Rule 17.2 | Rule 2.4  |

### **H. Service of Protests, Responses, and Replies**

TURN points out that proposed Rule 2.6 vastly expands the service requirement for protests and responses to applications as compared to the requirement under the current rule. AT&T's comment points out that the proposed rule as written doesn't provide for service on the applicant. These

changes were inadvertent, and so we modify the proposed rule to retain the current service requirement for protests and responses.

| Affected rule: | New rule:   |
|----------------|-------------|
| Rule 44.3      | Rule 2.6(a) |

### **I. Notice of Rate Increase Applications and Hearings**

Proposed Rule 3.2(b) modified current Rule 24 to require service of rate increase applications on various governmental entities, rather than simply notice of such applications. We modify proposed Rule 3.2(b) to reinstate the current notice requirement in lieu of service of the application. We also reinstate the requirement of current Rule 24, deleted from proposed Rule 3.2(b), that applicants “promptly notify” the Commission of service of notice of applications upon the governmental entities. However, we modify the rule to clarify that such notice to the Commission shall be filed, and to set a specific time for filing the notice.

Proposed Rules 3.2(c), 13.1(b) and 13.1(c) carry forward the language of current Rules 24 and 52 requiring applicants to file proof of notice of rate increase applications and hearings “at or before the hearing.” This phrase is ambiguous; documents for filing are to be tendered to the Docket Office, not to the Administrative Law Judge at hearing. We modify the proposed rules to clarify that such proof of notice is to be filed, not tendered at hearing.

Proposed Rule 3.2(c) carries forward the language of current Rule 24 requiring that proof of publication of notice of the application be provided to the Commission any time prior to hearing. Proposed Rule 3.2(d), like current Rule 24, does not require applicants to provide the Commission proof of mailing of

notice of rate increase applications. We modify proposed Rules 3.2(c) and 3.2(d) to require the filing of proof of publication and proof of mailing within a specified time.

| <b>Affected rule:</b> | <b>New rule:</b>         |
|-----------------------|--------------------------|
| Rule 24               | Rule 3.2(b), (c) and (d) |
| Rule 52               | 13.1(b) and (c)          |

#### **J. Instructions to Answer**

Proposed Rule 4.3, entitled “Service of Complaints,” incorporates the provisions of current Rule 6(b)(1) regarding the service of instructions to answer. We modify the title of Rule 4.3 to reflect that it addresses the subject of instructions to answer.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 12<br>Rule 13    | Rule 4.3         |

#### **K. Expedited Complaint Procedure**

We modify proposed Rule 4.5 to reference additional statutory provisions regarding the jurisdictional limit for small claims lawsuits, which likewise apply to the expedited complaint procedure.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 13.2             | Rule 4.5         |

#### **L. Prehearing Conference**

Proposed Rule 7.2 carries forward the language of current Rule 6.2 that provides for the setting of prehearing conference “whenever a proceeding seems

likely to go to hearing.” We modify proposed Rule 7.2 to clarify that a prehearing conference is required in a proceeding in which there has been a preliminary determination that a hearing is required.

|                       |                  |
|-----------------------|------------------|
| <b>Affected rule:</b> | <b>New rule:</b> |
| Rule 6.2              | Rule 7.2         |

### **M. Ex Parte Rules**

DRA and TURN object to proposed Rule 8.2(c)(2)(ii), which sets a time limit for parties to request an individual meeting with a decisionmaker. As written, the proposed rule may bar persons who become parties to a proceeding after the time for requesting an individual meeting from exercising their right to such a meeting. We therefore modify the proposed rule to withdraw this provision.

Proposed Rule 8.2(h) provides that the ex parte rules and restrictions that applied to the proceeding shall generally apply upon the filing of a petition for modification of the decision in the proceeding. We amend the proposed rule to provide that the ex parte rules and restrictions that applied to the proceeding shall likewise apply upon remand of the proceeding to the Commission by a court or upon the re-opening of a proceeding on the Commission’s own motion.

|                       |                    |
|-----------------------|--------------------|
| <b>Affected rule:</b> | <b>New rule:</b>   |
| (new)                 | Rule 8.2(i)        |
| (new)                 | Rule 8.2(c)(2)(ii) |



**N. Discovery**

Proposed Rule 10.1 sets forth the parties' right to discovery. We modify the proposed rule to clarify that it does not limit the rights of the Commission and its staff to obtain information pursuant to Pub. Util. Code §§ 309.5 and 314.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 59.1             | Rule 10.1        |

**O. Computer Model Documentation**

Proposed Rule 10.3 modifies current Rule 74.3(b) to require concurrent service of computer model documentation in conjunction with the service of the prepared testimony which it supports, rather than upon request as is currently required. AT&T California points out the documentation can be voluminous, typically only a few parties request the documentation, and the documentation may raise confidentiality issues. Given these considerations, we modify proposed Rule 10.3 to eliminate the requirement of concurrent service of computer model documentation.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 74.3(b)          | Rule 10.3(a)     |

**P. Referral to Law and Motion ALJ**

Although Resolution ALJ-164 provides for the referral of discovery disputes as well as other procedural motions to the law and motion ALJ, proposed Rule 11.6 only speaks to the referral of discovery disputes. We modify the proposed rule to authorize the referral of other procedural motions, consistent with Resolution ALJ-164.

|                       |                           |
|-----------------------|---------------------------|
| <b>Affected rule:</b> | <b>New rule:</b>          |
| (new)                 | Rule 11.7<br>(renumbered) |

**Q. Proposed Decision**

We modify proposed Rule 14.1(b) to clarify that a “proposed decision” is proposed by the presiding officer in a proceeding where one is designated (other than in an adjudicatory proceeding). We edit proposed Rules 13.2(c) and (d) to provide further clarification on this point.

|                       |                                      |
|-----------------------|--------------------------------------|
| <b>Affected rule:</b> | <b>New rule:</b>                     |
| (new)                 | Rule 13.2(c) and (d)<br>Rule 14.1(b) |

**R. Copies of Hearing Exhibits**

Consistent with Commission hearing room practice, we change proposed Rule 13.7(b) to require parties to provide to the presiding officer two copies of exhibits offered in evidence, rather than one original as provided in the current rules.

|                       |                  |
|-----------------------|------------------|
| <b>Affected rule:</b> | <b>New rule:</b> |
| Rule 71               | Rule 13.7(b)     |

**S. Briefs**

Proposed Rule 13.11 carries forward the language of current Rule 75 providing that “[e]xhibits may be reproduced in an appendix to a brief.” There is no need for parties to attach copies of record evidence to briefs. Furthermore, doing so unnecessarily burdens the record. We therefore delete this provision from Rule 13.11.

| Affected rule: | New rule:  |
|----------------|------------|
| Rule 75        | Rule 13.11 |

**T. Protective Orders; Serving (Not Filing) Testimony**

PG&E observes the proposed rules do not address how a party might seek a protective order limiting access to unredacted prepared testimony. Proposed Rule 11.3 addresses motions for protective orders to limit discovery of confidential material, and proposed Rule 11.4 addresses motions to file pleadings under seal. However, neither rule specifically addresses how to request a protective order limiting access to confidential material contained in prepared testimony that would otherwise have to be served on parties. PG&E recommends that we modify Rule 11.4 (motion to file under seal), as opposed to Rule 11.3 (motion to compel or for protective order), to include motions to protect the release of confidential material in prepared testimony.

PG&E’s observation is well taken, and we therefore modify the proposed rules to specifically address motions for protective orders for prepared testimony. However, we include this modification in Rule 11.3, rather than Rule 11.4. Rule 11.4 concerns filed pleadings, but prepared testimony is not to be filed. In contrast, Rule 11.3 concerns the exchange of information outside of the

formal file or the evidentiary record; prepared testimony that is served in advance of evidentiary hearings falls into this category.

We recognize, as PG&E and SDG&E point out, the longstanding practice of utilities filing prepared testimony as part of applications. Nevertheless, this practice is explicitly prohibited under our current rules (see Rule 2.7(b)), and for good reason: prepared testimony is intended as a substitute for oral testimony and, unlike filed pleadings, its admissibility into the record is subject to the rules governing oral testimony.<sup>2</sup> In addition, the filing of prepared testimony as an attachment to an application has become increasingly burdensome for the Commission's docket management, and is incompatible with electronic filing, which we are in the process of implementing. For all these reasons, we have recently taken various steps, including this rulemaking, to apprise practitioners of our intention to end this practice of filing as an attachment. (*See* Res. ALJ-190 and D.06-02-010.)<sup>3</sup>

We make two related modifications. First, as SDG&E comments, there are many applications submitted and processed without protest, where it would be efficient to take prepared testimony into the record without hearing. We

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<sup>2</sup> Proposed Rule 13.8(a) omits the statement of this principle, which is contained in current Rule 68. In order to avoid blurring this distinction between filed pleadings and prepared testimony, we reinsert this statement of principle into Rule 13.8(a).

<sup>3</sup> This is not to suggest that applicants should stop serving prepared testimony concurrent with the service of their filed applications. Service concurrent with the filing of the application or arbitration request is required in general rate case applications and in arbitrations brought under the 1996 Telecommunications Act, and we encourage the continued practice of concurrently serving prepared testimony in support of applications to provide parties with early notice of the factual basis underlying their requests, thereby allowing more timely resolution of proceedings.

adopt a new rule to govern motions for the receipt of prepared testimony in certain uncontested proceedings.

Second, the rules as originally proposed did not provide for motions to seal the evidentiary record, including prepared testimony that is offered in evidence. We adopt a new rule to govern motions to seal the evidentiary record at hearing and in certain uncontested proceedings.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 61               | Rule 11.3        |
| (new)                 | Rule 11.4        |
| (new)                 | Rule 11.5        |
| Rule 68               | Rule 13.8        |

#### **U. Amendments and Corrections to Prepared Testimony**

Proposed Rule 1.12 omits the statement contained in current Rule 2.6 providing that errata listing minor typographical or wording corrections “may be made at any time, provided the correcting document is served on all parties.” PG&E points out that service and admission of a prepared exhibit listing such corrections to prepared testimony prevents surprise and the waste of time at hearing, and asks that we reinstate this statement in proposed Rule 1.12.<sup>4</sup>

Proposed Rule 1.12 is inapplicable to this point. The rule addresses amendments and corrections to filed documents; as discussed above, prepared

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<sup>4</sup> Although current Rule 2.6 states that parties may serve corrections to filed documents, it does not require that they do so. PG&E does not request a rule requiring service of corrections to prepared testimony and, because it may not be appropriate in all circumstances, we decline to do so. However, nothing in the rules precludes the parties from serving advance copies of such exhibits, and we encourage them to do so.

testimony is not to be filed. We adopt the rule as proposed. However, in order to clarify the procedure for correcting prepared testimony, we amend proposed Rule 13.8(b) (“Prepared Testimony”) to provide, consistent with current Commission practice, that minor corrections to prepared testimony may be made by prepared exhibit in lieu of oral testimony.

| <b>Affected rule:</b> | <b>New rule:</b> |
|-----------------------|------------------|
| Rule 68               | Rule 13.8(b)     |

## **V. Request for Award of Compensation**

The proposed rules eliminate current Rule 76.72, which defines “final order or decision” for the unstated purpose of determining the time to file a request for an award of compensation. We reinstate the content of current Rule 76.72, with editorial modifications to explicitly specify the time for filing such requests.

| <b>Affected rule:</b> | <b>New rule:</b>                    |
|-----------------------|-------------------------------------|
| Rule 76.72            | Rule 17.3<br>Rule 17.4 (renumbered) |

## **W. Table of Filing Fees**

We modify the Table of Filing Fees, updating it to reflect statutory changes and current Commission requirements.

| <b>Affected rule:</b> | <b>New rule:</b>     |
|-----------------------|----------------------|
| Table of Filing Fees  | Table of Filing Fees |

**X. Miscellaneous edits**

We modify the following proposed rules to make non-substantive, clarifying and/or typographical edits. We also provide authority for the rules where none is currently noted.

| <b>Affected rule:</b> | <b>New rule:</b>    |
|-----------------------|---------------------|
| Rule 53<br>Rule 54    | Rule 1.6(a)         |
| Rule 2.1(a)           | Rule 1.4            |
| Rule 2.1(b)           | Rule 1.7            |
| Rule 2.6              | Rule 1.12(c)        |
| Rule 2.5<br>Rule 3    | Rule 1.13(l)        |
| Rule 17               | Rule 2.3            |
| Rule 17.1(j)(1)       | Rule 2.5(a)         |
| Rule 17.1(j)(3)       | Rule 2.5(c)         |
| Rule 18(h)            | Rule 3.1(h)         |
| Rule 33(c)(1)         | Rule 3.5(c)(1)      |
| Rule 12               | Rule 4.3            |
| Rule 14.3             | Rule 6.1            |
| Rule 5(j)             | Rule 8.1(a)         |
| Rule 5(f)             | Rule 8.1(b)         |
| Rule 7(c)             | Rule 8.2(c)         |
| Rule 2.6(a)(2)        | Rule 8.6(b) and (c) |
| Rule 63.2(c)          | Rule 9.2(c)         |
| Rule 74.5(a)          | Rule 10.3(c)        |
| Rule 51.1(a)          | Rule 12.1(a)        |
| Rule 77               | Rule 13.14          |
| Rule 77.7(e)          | Rule 14.7(a)        |

#### **IV. Other Comments on Proposed Rules**

##### **A. Notice of Request for Authority to Increase Rates**

TURN expresses concern that proposed Rule 2.6(a) contains substantive edits to the current Rule 24. Specifically, proposed Rule 2.6(a) changes the current reference to “increased costs” to “new costs.”

The proposed rule as written reflects the current statutory requirements of Pub. Util. Code § 454 as amended by Stats. 1999, Ch. 1005, Sec. 11.5, which was effective January 1, 2000. We adopt it as proposed.

##### **B. Deletion of Current Rule 72**

TURN and Verizon oppose the deletion of current Rule 72, which addresses the offer in evidence of documents on file with the Commission. TURN and Verizon express concerns that Rule 72 is required in order to enable a party to enter into the record information that is in the record of another proceeding. The concerns are groundless.

The deletion of Rule 72 does not bar the introduction of documents contained in the record of one proceeding into the record of another; it simply eliminates the ability to do so by reference, and instead requires parties to produce copies of such documents when offering them as exhibits. Documents offered in evidence under Rule 72 are subject to the same objections as any other documents and prepared testimony. In view of Rule 13.6(a) (old Rule 64) and Commission practice, which permit hearsay evidence (so long as the substantial rights of parties are preserved) and dispense with the formal foundation rules of evidence, there is no need for a special rule for documentary evidence from another Commission proceeding.



We also note that neither current Rule 72 nor its deletion permits *testimony* from another proceeding to be received by reference; testimony from another proceeding must be presented as an exhibit. By deleting Rule 72, we require the same treatment of non-testimony documents from another proceeding as for testimony from another proceeding.

**V. Comments on Changes to the Rules as Originally Proposed**

In accordance with Cal. Admin. Code, Tit. 1, § 44, notice of the draft decision, including an appendix showing the full text of the rules as originally proposed with the changes discussed herein clearly indicated, was served on the persons on the service list used in this proceeding, including all persons who filed written comments on the OIR . The notice was served on June 14, 2006, and directed that comments on the proposed changes be filed by no later than June 30, 2006. The public availability period began on June 14, 2006 and ended on the date of this order.

**VI. Text of the Adopted Rules**

We adopt the amended Rules of Practice and Procedure, Title 20, Division 1, of the California Code of Regulations as shown in the appendix to today's decision.

**VII. Assignment of Proceeding**

Commissioner Rachelle Chong is the Assigned Commissioner and Hallie Yacknin is the assigned ALJ in this proceeding.

**Findings of Fact**

1. The amendments to the Rules of Practice and Procedure (Title 20, Division 1, Chapter 1 of the California Code of Regulations), shown in the

appendix to today's decision, will update, clarify or simplify the Rules, and repeal outdated Rules.

2. The proposed amendments were noticed in the Commission's Notice of Proposed Regulatory Action printed in the California Regulatory Registry of March 17, 2006 (Register 2006, Vol. No. 11-Z, p. 331.)

3. The OIR proposing the amendments was served on those persons appearing on a service list commonly used for such procedural purposes. While other persons could request to be placed on the service list, no request was made.

4. The period for commenting on the proposed amendments set forth in the OIR remained open for 45 days following the publication of the Notice of Proposed Regulatory Action.

5. The period for commenting on the changes to the proposed amendments, set forth in the draft decision in this proceeding, remained open for 36 days following the issuance of the draft decision in this proceeding. The draft decision was served on all persons appearing on the service list commonly used for such procedural purposes, which includes all parties who filed comments on the OIR.

6. It is reasonable to adopt the amendments to the rules, as shown in the appendix attached to this decision.

### **Conclusions of Law**

1. The Commission should adopt the amendments to the Rules of Practice and Procedures.

2. In order to complete the adoption process promptly, this order should be effective immediately.

3. This rulemaking should be closed.

**O R D E R**

**IT IS ORDERED** that:

1. The amendments to the Rules of Practice and Procedure, as shown in the attached appendix to today's decision, are adopted.
2. The Chief Administrative Law Judge shall take all appropriate steps to submit the newly adopted rules to the Office of Administrative Law for purposes of approval and printing the newly adopted rules in the California Code of Regulations.
3. Rulemaking 06-02-011 is closed.

This order is effective today.

Dated \_\_\_\_\_, San Francisco, California.